CHANGES TO COURT ROOM RULES OF EVIDENCE AND HOW THEY AFFECT LAW ENFORCEMENT

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The Federal Rules of Evidence (FREs) changed on 1 December 2000. These changes affect how law enforcement officers (LEOs) collect, preserve, and document evidence for court. The news this year is generally good for law enforcement. Some doors have been opened wider to us and some documents will be easier to collect and admit.

Cases grounded on quality and admissible evidence are the ones chosen for prosecution. Evidence that is not only admissible, but also has strong potential to convince juries, get convictions. By the time your investigation is underway and the prosecutor starts thinking about a trial, it may be too late to document facts necessary for admissibility. Physical evidence has been collected. Statements have been taken. Leads have dried up. Memories faded. Witnesses disappeared. Documents are shredded. E-mail has been deleted. And, of course, computer hard drives have crashed.

LEOs do not need to know the intricacies of the FREs any more than prosecutors need to know how to conduct a criminal investigation. But just as we want prosecutors to know some very basic law enforcement skills to better prosecute and win convictions, LEOs need to know what it takes to give prosecutors a winnable case supported by admissible evidence.

Only those rules that directly affect law enforcement are addressed. If you wish to see the actual changes to the FRE, email the author at khodges@fletc.treas.gov.

THE DOOR OPENS WIDER ON "BAD" CHARACTER EVIDENCE OF THE DEFENDANT

THE WAY IT WAS

During its case-in-chief, the prosecution may not offer character evidence (opinion or reputation) about the defendant to prove the defendant "acted in conformity" with that character trait. So, if the defendant is charged with a fraud crime, the prosecution cannot offer a witness to testify, "In my opinion the defendant is dishonest" or "The defendant has a reputation for being dishonest" to prove "he was a swindler before and he swindled again." The *defense is permitted* to offer pertinent character traits of either the defendant or a victim. So, in our fraud case, the defendant could offer character evidence that the defendant was honest. Working on a theory that the victim was the real swindler, the defense could also offer evidence that the victim is dishonest. These rules have not changed.

Once the defense opens the door by offering character evidence, the prosecution can rebut with character evidence of the same trait pertaining to the same witness. For example, defense character evidence that the defendant is honest can be rebutted by the prosecution with character evidence that he is dishonest. Defense character evidence that the victim is dishonest can be rebutted with prosecution evidence that the victim is honest. These rules

have not changed.

The scope of the prosecution's rebuttal looked like this:

Defense offers: "The defendant is honest"
Prosecution rebuttal: "The defendant is dishonest."

Defense offers: "The victim is dishonest."
Prosecution rebuttal: "The victim is honest."

Except in limited assault prosecutions, the prosecution could *not* rebut defense evidence of the *victim's* bad character with evidence of the *defendant's* bad character, in effect saying, "The victim isn't the dishonest one, you, the defendant, are."

This limited scope of prosecution rebuttal usually worked to the defense's advantage. The defense could attack the victim's character without opening the door to the defendant's character. The prosecution could be armed with bad-character evidence about the defendant but could not use it unless the defendant offered evidence of his own character. The prosecution could not attack the defendant's character just because the victim's character was being assassinated.

THE CHANGE

If the defense attacks the *victim's character*, the prosecution may now offer evidence of the *defendant's character* in rebuttal.

The scope of the prosecution's rebuttal now looks like this:

Defense offers: The defendant is honest.
Prosecution rebuttal: The defendant is dishonest.

Defense offers: The victim is dishonest.
Prosecution rebuttal: The victim is honest *and/or* the defendant is dishonest.

LEOs should not confuse offering evidence of a defendant's or a victim's character trait with character evidence of truthfulness. The FREs have always provided that when a witness (to include the defendant) testifies, the other side may attack that witness' credibility by offering character evidence of untruthfulness. Also, if the truthfulness of a witness (to include the defendant) is attacked, the other side may rehabilitate the witness with character evidence of truthfulness.

WHAT THIS MEANS TO LEOs

Evidence of the defendant's "bad character" now has a greater chance of being admitted

even if the defendant does not testify. LEOs now have a greater motive to collect and document it.

BUSINESS RECORDS: LAYING A FOUNDATION IS EASIER AND CUSTODIANS ARE LESS FREQUENTLY REQUIRED TO TESTIFY

THE WAY IT WAS

Unless the defense stipulated, admitting commercial business records into evidence usually required having the custodian testify to lay a foundation to meet authenticity requirements. While public (government) records were self-authenticating if under seal or certified, thereby eliminating the need to call

witnesses to lay a foundation, there was no provision to allow commercial business records to be self-authenticating.

THE CHANGE

1. Self-authentication certification. If the custodian or "other qualified person" certifies that commercial business records meet certain criteria, the records will not require a witness to lay a foundation. The certification must state that the record (explanation in parenthesis):

(A) Was made at or near the time of the occurrence of the matters set forth by,
or from information transmitted by, a person with knowledge of those matters; (Was a record generated by either the person who completed the transaction or by a person who received information from the person who conducted the transaction?)

(B) Was kept in the course of the regularly conducted activity; (Did the business, as part of its regular course of business, maintain such a record? An after-the-fact record that is not ordinarily created or not ordinarily maintained cannot be self-authenticating.)

(C) Was made by the regularly conducted activity as a regular practice. (Did the business, as part of its regular course of business, create such a record? If a business activity does not ordinarily issue a written receipt, obtaining a receipt to be used in the trial does not meet self-authentication criteria.)

2. Types of records covered by the new rule. Records that businesses create and maintain in the ordinary course of business and which were created at or near the time of the transaction by people with knowledge of the transaction can be self-authenticating. If they are self-authenticating, a witness is not required to lay a foundation. For example, if a defendant rented a car, a certified copy of the car rental contract is self-authenticating and, as we will see later, is admissible to prove that the defendant rented that car without the need to call a witness. Millions of business transactions that occur every day are accompanied by receipts,

confirmations, contracts, statements, and accountings. These transactions generate business records that can be self-authenticating.

3. Types of records that are not covered by the new rule. Unless the record meets all three criteria, it cannot be self-authenticating. So, for example, if a receipt is not regularly made and a copy maintained when conducting a transaction, having a sales person create a receipt after-the-fact will not result in a self-authenticating document. A specialized or tailored printout that is not ordinarily prepared at or near the time of a transaction cannot be self-authenticating.

4. The prior notice requirement. A party that wants to use self-authenticating business records must give advance notice before trial of the records being offered to give the opponent an opportunity to inspect and challenge them. This provision permits the trial lawyers to determine whether the document meets the business record criteria. The Rule will give the prosecution advance notice of defense self-

authenticating business records, and it also gives the defense advance notice of prosecution records. Many of these records will be discoverable anyway under the Federal Rules of Criminal Procedure, but it is an issue that LEOs should discuss with prosecutors.

5. Hearsay and business records. Another significant issue with any piece of documentary evidence is whether the jury will be allowed to consider the contents of the document to prove the truth of what that documents says. Using the rental car contract example discussed earlier, self-authentication satisfies only authentication-foundation requirements. In other words, it satisfies the concern whether the record is an authentic record of the transaction. Because of the hearsay rule, authenticating the document does not mean that the document is admissible to prove the defendant rented a certain car. Under the old Rule, the prosecution would have to bring in a witness to testify to meet the business records hearsay exception. Under the new Rule, if the business record meets self-authentication standards, it also meets the business records hearsay exception and can be used to prove the truth of the matters contained in it.

WHAT THIS MEANS TO LEOs

1. Laying a foundation for most business records is now easier and will not ordinarily require calling a live witness at trial.

2. If a business record is self-authenticating, it also meets the requirements of the business records hearsay exception. No witness is required.

3. Advance notice must be given to the defense if self-authenticating business records will be offered at trial.

4. When collecting business records, establish the business record criteria with an employee of the company.

5. Work with your prosecutor to develop a template or standardized certificate to be used to self-authenticate business records. That document will probably have to be tailored to meet the facts of any particular record being collected.

THE SCOPE OF EXPERT AND LAY WITNESS TESTIMONY

THE WAY IT WAS

What is admissible as expert testimony has received enormous attention from the Federal Courts in the last seven years. Not only have juries come to expect physical evidence in criminal prosecutions, they expect experts to explain it. Defense counsel have also attempted to open expert witness doors to evidence of various disciplines that many claim are not scientifically based.

In most cases, a lay witness (non-expert) may not offer an opinion, but may only testify to facts about which they have personal knowledge. An expert witness is allowed to give an opinion. The battleground has been the topics on which experts may testify and how acceptable or reliable the body of science or expertise must be.

Lay witness opinion or inference is permitted only when rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. The permissible scope of lay witness

testimony is often described as that which results from a reasoning process familiar to everyday life. A lay witness, for example, can testify, "He looked nervous as I approached." There were situations, however, where what should have been expert opinion was "smuggled" in as lay witness opinion without calling an expert witness. This would occur where someone without any specialized training or experience would be allowed to give their opinion in cases where an expert was required. For example, an opinion about a ballistics comparison with a photo showing the known and questioned projectiles might be based upon a rational perception, but it is really the subject of expert, not lay, testimony.

THE CHANGE

The Rules are now clear that an expert may give an opinion only if:

1. The testimony is based upon sufficient facts or data,

2. The testimony is the product of reliable principles and methods, and

3. The witness has applied the principles and methods reliably to the facts of the case.

More importantly for law enforcement, the scope of what a lay witness may testify about has been restricted to *exclude* that which is based on scientific, technical, or other specialized knowledge. Now, there is clear legal authority to exclude the testimony of those who are "almost experts."

WHAT THIS MEANS TO LAW ENFORCEMENT

1. Opinions based on "scientific disciplines" that do not have a track record or are not shown to be reliable should be excluded from evidence. While challenging expert testimony is usually the prosecutor's responsibility, LEOs who have information about the reliability or acceptance of a particular "expert" area, should let the prosecutor know.

2. Unless LEOs have knowledge, skill, experience, training or education to be an expert witness, they will not be permitted to give an opinion on scientific, technical, or other specialized knowledge.

CONCLUSION

The changes to the Federal Rules of Evidence are effective now in Federal trials. They do not apply to State court unless the State has adopted them. LEOs may wish to discuss these changes with their prosecutors for those cases in which the changes might apply.